

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 21ST JUNE 2007 / 31ST JYAISHTA 1929

SA.No. 105 of 1994(')

**(AGAINST THE DECREE AND JUDGMENTS IN AS.140/1991 of ADDL.SUB
COURT, IRINJALAKUDA AND OS.1476/1988 of ADDL.M.C.,IRINJALAKUDA)**
.....

2ND DEFENDANT:APPELLANT:

**RAMAN NAIR,
AGED 60 YEARS,
S/O.PATTATHIL LAKSHMU AMMA,
NELLAYI VILLAGE, MUKUNDAPURAM TALUK.**

BY ADV. SRI.K.P.SREEKUMAR

PLAINTIFF AND DEFENDANTS 1 & 3:RESPONDENTS:

- 1. SANTHI FINANCE,
NELLAYI VILLAGE,
MUKUNDAPURAM TALUK.**
- 2. SAVITHRI AMMA,
D/O.NEDIYAMPARAMBATH,
PARVATHY AMMA, NELLAYI VILLAGE,
MUKUNDAPURAM TALUK.**
- 3. MOHANDAS,
S/O.PATTATHIL RAMAN NAIR,
NELLAYI VILLAGE, MUKUNDAPURAM TALUK.**

BY ADV. SRI.V.BHASKARA MENON for R1

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 21/06/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

M.SASIDHARAN NAMBIAR,J.

S.A.NO.105 OF 1994

Dated 21st June 2007

J U D G M E N T

Second defendant in O.S.1476 of 1988 on the file of Additional Munsiff, Irinjalakuda is the appellant. First respondent is the plaintiff firm and respondents 2 and 3 are defendants 1 and 3. Second respondent is the wife and 3rd respondent, the son of the appellant. First respondent instituted the suit seeking a decree for realisation of Rs.9,800/- due under Ext.A2 promissory note executed on 9/10/1985 contending that in spite of demand and sending of notice the amount due was not paid. Appellant along with his wife and son filed joint written statement contending that appellant is a partner of first respondent firm and therefore suit by a partner against another partner is not maintainable. It was also contended that promissory note was not executed and as first respondent firm is not a registered firm the suit is not maintainable. It was further contended that suit was filed when appellant demanded dividend

from the firm which was not paid and therefore suit is not maintainable. First respondent firm examined two witnesses and marked Exts.A1 to A3. Defendants did not adduce any evidence. Learned Munsiff rejected the challenge against maintainability of the suit holding that suit was not by one partner against another partner but by the firm against the partner, for the amount due under the promissory note. On the evidence it was found that Ext.A2 promissory note was executed and the amount claimed was due and all defendants are jointly and severally liable. Suit was decreed. Appellant alone challenged the decree and judgment before Sub court, Irinjalakuda. Learned Sub Judge on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in second appeal.

2. Second appeal was admitted formulating following substantial questions of law.

(1) Whether finding of first appellate court that registration under Section 11 of Income Tax Act is not necessary as first respondent firm has not engaged in the business of finance is correct.

(2) When appellant is one among

15 partners of the firm whether suit against one partner is maintainable.

3. Learned counsel appearing for appellant was heard. There was no representation for respondents.

4. When the appeal was admitted and appellant sought an order of stay of execution of the decree, order of stay was granted on condition that appellant deposit entire decree amount before the executing court. Subsequently as the condition was not complied with the petition was dismissed vacating the order of stay. It was fairly submitted by learned counsel appearing for appellant that after vacating the order of stay, first respondent has executed the decree and realised the decree debt by sale of the property of the appellant.

5. Factual finding by courts below that appellant along with other defendants executed Ext.A2 promissory note and the amount claimed in the plaint was due cannot be disputed. Only question is with regard to maintainability of the suit. Though appellant contended that suit is not maintainable, on the ground that appellant is one of the partners of the firm, it was rightly repelled by courts below holding that suit is not by one partner against other partner, but a

suit for realisation of the amount due to the partnership three defendants under a promissory note, though one defendant was one of the partners. Similarly courts below entered a factual finding that first respondent firm is not engaged in the business of finance. Section 11 of Companies Act is applicable only if first respondent firm was engaged in the business of finance. As it is not so, challenge against maintainability of the suit on that ground also was repelled by the courts below.

There is no merit in the appeal. It is dismissed.

**M.SASIDHARAN NAMBIAR,
JUDGE.**

uj.

=====

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.105 OF 1994

21ST JUNE 2007

=====